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Supreme Court of the United States

October Term, 1968

No. 858

JOHN MOORE, trading and doing business as MOORE'S BARBEQUE RESTAURANT,

Petitioner,

v.

E. W. WOOTEN, W. G. HICKMAN, R. M. WHITEHEAD, ANNIE B. DAVIS, HAUANA SUGGS, ROBERTA SUGGS, ALBERT C. EDWARDS, CLARA B. SAUNDERS, DOROTHY WILLIAMS and L. C. NIXON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

L. John Moore, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on September 5, 1968.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit is unreported and is printed in Appendix A, hereto, *infra*, App. page i. The judgment of the Circuit Court of Appeals for the Fourth Circuit is printed in Appendix A, hereto, *infra*, App. page v. The Opinion and Order of the United States District Court for the Eastern District of North Carolina is unreported and printed in Appendix B, hereto, *infra*, App. page 23.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 5, 1968. The jurisdiction of the Court is invoked under Title 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Courts have constitutional authority to found jurisdiction under the interstate commerce clause of the Constitution (Article 1, Section 8, Clause 3, of the Constitution of the United States), based upon evidence specifically found by the District Court to be manufactured evidence, which findings were required to establish federal court jurisdiction and which findings have not been disturbed by the Court of Appeals although jurisdiction was challenged by appeal?

2. Whether an appellate court has the constitutional authority, within the limits prescribed by the due process clause of the Constitution of the United States (Fifth Amendment to the Constitution of the United States), to reverse the findings of facts of the District Court and make additional findings contrary thereto, in order to affirm the conclusions of law of the District Court without affording the appellant the opportunity to be heard in respect to the additional findings?

3. Whether due process of law as ennunciated in the Constitution (Fifth Amendment to the Constitution of the United States), permits the imposition of the penalties of attorney's fees without a hearing or findings in respect thereto, in that the application as stated in the Judgment of the Court of Appeals is inherently punitive with the design and result of discouraging appeals?

STATUTE INVOLVED

Constitution of the United States:

Article 1, Section 8:

> "The Congress shall have power (3) To regulate commerce with foreign nations, among the several states, and with the Indian Tribes."

Amendment V.

> "No person shall be held to answer for a capital or otherwise infamous crime, ... , nor be deprived of life, liberty, or property, without due process of law; . . . ."

Title II of The Civil Rights Act of 1964,

78 Statute 243, Title 42 USC, Sec. 2000a et seq.

SECTION 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if the discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within its premises, an establishment the operations of which affect commerce

within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the state or political subdivision thereof.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

SECTION 202. All persons shall be entitled to be free, at an establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

SECTION 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or

attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

SECTION 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been

given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided.* That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided Further,* That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

SECTION 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204 (d) and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

SECTION 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and

is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General) (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the

chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

SECTION 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

STATEMENT

This action originated as a class action seeking injunctive relief as provided for under the provisions of Title II, of the

Civil Rights Act of 1964, 78 Statute 243 (App. B, pp. 8-15). It is an action brought by Negro plaintiffs against the defendant who is the owner and operator of a barbeque restaurant and take-out barbeque in New Bern, North Carolina.

Jurisdiction of the Court was invoked in the Complaint under Title 28 USC, Sections 1343 (3) and 1343 (4), and the jurisdiction of the Court under these particular sections is not challenged. The more fundamental authority of the Federal Courts to pass upon the issues presented is strenuously challenged in that defendant has consistently denied that jurisdiction is constitutionally possible under the particular facts of this case and as they were found by the District Court.

Plaintiffs filed the Complaint in the District Court on November 10, 1966, alleging in Summary (App. B, pp. 1-6): That defendant maintained a policy of withholding and interfering with the rights of plaintiffs and others similarly situated in the full use and enjoyment of defendant's facilities due to discrimination and segregation on the grounds of race or color. In support of the jurisdiction of the Court to pass upon the issues, plaintiffs alleged: Defendant's operation affected trade, travel and commerce between the several states; defendant served and offered to serve interstate travelers; a substantial portion of the food served by defendant moved in commerce and other allegations alleging state participation (App. B, pp. 1-6).

By his Answer (App. B, pp. 6-8), defendant denied that any authority upon which plaintiffs relied applied to him. Defendant did not deny the statutory jurisdictional allegations but specifically denied the more fundamental constitutional basis for the jurisdiction of the federal courts in that: Defendant denied serving or offering to serve interstate travelers (App. B, pp. 7-8); that his operations affected trade, travel and commerce between the several states;

that substantial portions of the food served by him moved in interstate commerce; or that the State participated in his alleged discriminatory acts.

The facts as found by the District Court were not disputed by defendant although they were challenged in certain respects by the plaintiffs. Defendants did, of course, challenge certain conclusions of law of the Court and plaintiffs also challenged conclusions of the Court. Plaintiffs, through their attorneys, also moved for the allowance of attorney's fees upon the appeal although the District Court did not allow fees. It is noted in this respect that at no point in the proceedings does the record reveal that plaintiffs testified, offered themselves for examination or appeared so defendant could confront them.

District Court: Findings of Facts

Defendant was in the barbeque restaurant business in New Bern, North Carolina, for many years. His place of business had been at a location on Broad Street (which is also U.S. Highways 70 and 117), since the year 1951 (App. B, p. 26). Although located on Broad Street no substantial parking facilities were available to customers (App. B, pp. 26 and 27).

There were two sections to the restaurant, a take-out section and an adjacent "dining room area" with an opening between the two. The kitchen was located behind the take-out section. Three entrances to the entire establishment existed, with two entering the dining room and one entering the take-out section. At all entrances was displayed a sign with 1¾" block lettering advertising, "We do not cater to interstate patrons and the principal foods sold in this restaurant are North Carolina products" (Defendant's Exhibit No. 30) (App. B, p. 27).

Defendant and his immediate family members refused service to any interstate traveler as soon as one was detected, that is if one should try to enter. Defendant knows almost all the patrons personally, but it was admitted that not all persons eating or buying food at the restaurant could be checked to see if they were interstate travelers (App. B, p. 27). Plaintiffs, however, were unable to produce one bona fide interstate traveler although the case had been pending from November 10, 1964, to April 17, 1967, a period of two and one-half years (App. B, p. 28, date Complaint filed to date of trial).

"The nearest thing to a genuine interstate traveler" (App. B, p. 28), that plaintiffs did produce was one Brian Cabelle, a student from Washington, D. C., who spent the night of April 16, 1967, in New Bern, North Carolina. He actually walked to the restaurant from a near-by funeral home on the day of trial. He was paid to eat at the restaurant and he served as the one example of a highly questionable interstate traveler (App. B, pp. 28, 19-23 and App. C, pp. 161a-166a). He intentionally violated the sign at the entrance (App. B, p. 28) and the Court did not specifically find him to be an interstate traveler (App. B, p. 28). The Court did find that this was the only witness for plaintiff who could challenge in any way defendant's ability to remain free of interstate commerce (App. B, pp. 27a-28a).

There was no evidence to support plaintiffs' allegations that the State of North Carolina required any segregation of facilities on the basis of race (App. B, p. 29). In respect to defendant's restaurant having a substantial effect upon interstate commerce, the Court concluded that between two per cent and three per cent of his total purchases (dollar amounts of between $2,000.00 and $3,000.00 per year), were in orders for goods from out of state (App. B, p. 29). The Court further found that defendant did not ship any food in commerce (App. B, p. 29).

District Court: Conclusions of Law

The Court initiated the legal conclusions with the Statement that ". . . the sole, determinative question for the Court is whether Moore's Barbeque Restaurant is an establishment covered by Title II, Section 201, of the Civil Rights Act of 1964" (App. B, p. 29). The Court went on to conclude that the single issue was one of *"coverage"* (emphasis supplied) (App. B, p. 29).

The Court then stated that in order to find "coverage" under the Civil Rights Act of 1964, Plaintiffs had to prove that defendant operated a "place of public accommodation" within the meaning of the Act; that is, plaintiffs had to prove the defendant's operations affected commerce and that it was principally engaged in selling food for consumption on the premises (App. B, p. 31). The Court then concluded, "There is no question but that defendant does not *offer* to serve interstate travelers . . ." (Emphasis supplied) (App. B, p. 30). This conclusion was subsequently reversed by the Court of Appeals (App. A, p. iv).

The Court went on to conclude, however, that what defendant offered to do (his intent), and what he in fact did, was "another matter" (App. B, p. 30). The Court stated that a proprietor who might otherwise be covered by the Civil Rights Act of 1964, "cannot remove or exclude himself or his business from coverage by the mere posting of signs advising would-be patrons that he does not serve interstate travelers" (App. B, pp. 30-31). The Court concluded that intent to avoid affecting commerce was not enough, but there must in fact be no effect upon commerce (App. B, p. 31).

The plaintiffs produced one witness, the Court concluded, who might be an interstate traveler, coupled with an admission by defendant that local advertising (local newspaper and local radio) does not state a refusal by defendant to

serve interstate travelers. From this evidence the Court stated that a prima facia case was made (App. B, p. 31).

The Court went on to hold defendant had proven "that virtually all of his patrons are local . . . (and that his restaurant) would tend to repel a person traveling through the State and through the City of New Bern rather than attract him." It was further found that *"not one bona fide interstate traveler who has eaten at Moore's Restaurant was produced at the trial by plaintiffs or their attorneys"* (Emphasis added) (App. B, pp. 31-32). Then the Court went on to say that the proof established defendant served interstate travelers "within the meaning of 42 U.S.C. 2000a (c) (2)" (App. B, p. 33). But, that plaintiffs failed to prove that a substantial portion of the food served moved in commerce (App. B, p. 33).

The remaining conclusions relate to the legal issue of whether or not defendant was "principally engaged in selling food for consumption on the premises," (App. B, p. 33) with the Court finding that 62 per cent of the food sold by defendant was sold for consumption off the premises (App. B, p. 33). The Court stated further that the plain meaning of the statute, "principally engaged in selling food for consumption on the premises" meant just that and defendant did not do so (App. B, p. 34). "However, in a recent decision, the Court of Appeals 'for this circuit interpreted for consumption on the premises' to mean 'readying for consumption on the premises' " (App. B, p. 34). It was thereupon concluded that defendant fell within this category of business (App. B, pp. 34 and 35).

District Court: Order

The Court enjoined defendant and his employees from denying or interfering with plaintiffs and other Negroes similarly situated in the use and enjoyment of his facilities

on the basis of race or color (App. B, p. 35). Plaintiffs were also allowed the costs of the action (App. B, p. 35).

Notice of Appeal from the Order of the District Court was filed on August 16, 1967. An Order Extending Time for filing the record and docketing the Appeal for ninety (90) days was granted defendant on September 5, 1967, said ninety (90) days to commence from the date the Order was filed.

The defendant presented three questions to the Court of Appeals (App. B, pp. 7-8):

> "1. Whether the Federal Courts have the constitutional authority to grant a plaintiff relief under Title II of the Civil Rights Act of 1964, if the Defendant in his business operations does not have a substantial connection with interstate commerce?
>
> "2. Whether an Act of Congress is enforceable against a defendant who does not have a substantial connection with interstate commerce, when said Act has as the basis for its enforcement procedures the requisites of interstate commerce, or would such enforcement violate the standards of the dual system of government established by the Constitution of the United States?
>
> "3. Whether the operations of defendant fall within the statutory requirements of Title II of the Civil Rights Act of 1964, if these operations do not have substantial effect upon interstate commerce?"

On September 5, 1968, the Court of Appeals filed an Opinion and Judgment adverse to the defendant. The Court stated:

> "We affirm the order of the district court and remand the case for allowance of counsel fees to the plaintiffs." (App. A, p. ii).

The Court then went on to state a brief resume of the facts as found by the District Court and went specifically into the status of six witnesses for the plaintiff. The summation by the Court of Appeals in respect to these witnesses was materially different from that reached in the District Court and this material difference bears directly upon the basic questions in suit.

The District Court specifically found that the six witnesses were not bona fide interstate travelers. In fact, it found and concluded, "The slight direct evidence produced at the trial on the question of whether defendant served interstate travelers *was manufactured by use of deliberate subterfuge practiced upon the defendant.*" (Emphasis supplied) (App. B, pp. 31-32). This status of plaintiffs' witnesses was brought to the attention of the Court of Appeals in the first question presented, and was directly argued to the Court (App. B, pp. 10-12). The Court of Appeals did not explore this status at all, however, but merely concluded that defendant "served interstate travelers" (App. A, p. v), the conclusion being based on the testimony and evidence of the same witness (App. A, pp. iii-v).

Additionally, the Court of Appeals concluded that defendant "offered to serve white travelers, regardless of their residence" (App. A, p. v). This finding and conclusion being in disagreement with the trial court (App. B, p. 30). This is a direct finding of fact by the appellate court, the effect of which is to reverse the conclusion of the trial court in order to sustain the order of the trial court. This is done without offering the party against whom such a result is reached the opportunity to make a full presentation in that the facts as found by the trial court were not disputed by defendant. Due to this position taken by the defendant, he did not present that portion of the record, nor argument in support of the record, to sustain the trial court.

The Court of Appeals went on to conclude that "the fact that Moore serves, or offers to serve, interstate travelers provides a sufficient constitutional basis for subjecting him to the Act" (App. A, p. vi). These two conclusions were reached on the basis of one set of facts placed in issue from the outset of the appeal. The status of this one set of facts was never discussed by the Court of Appeals (the founding of federal jurisdiction upon manufactured evidence). These conclusions amounting to a reversal of the trial court's findings and conclusions, in order to sustain the order of the trial court.

The Court of Appeals concluded that defendant actually served interstate travelers, reaching this conclusion after accepting manufactured evidence as its basis for reaching this conclusion and for *assuming federal court jurisdiction.* Secondly, it concluded that defendant *offered to serve* interstate travelers despite the trial court's findings to the contrary.

The Court of Appeals reached another conclusion contrary to the findings and conclusions of the trial court, and it did so in a strange manner. Conceding that Moore had a trivial impact on interstate commerce (App. A, p. vi), it concluded that defendant was still subject to regulation by Congress because "The effect upon interstate commerce of Moore's business combined with that of similar establishment is not trivial" (App. A, p. vi). Again, the findings and conclusions of the trial court were reversed in order to sustain his Order. The District Court concluded, "that plaintiffs failed to carry the burden of proof on that issue." Needless to say, defendant did not resist the court's findings on this point and he did not bring forward with the record that evidence to support the District Court. The Court of Appeals, by reversing the District Court places the appellant in an impossible position.

Finally, the Court of Appeals concluded that *after the decision* of the District Court, counsel fees should ordinarily be allowed "unless special circumstances would render such an award unjust." It then remanded with the direction that "the District Court include reasonable counsel fees as part of the costs," holding that no special circumstances appear.

It goes without saying that defendant made no attempt to present such circumstances and as it now stands such an opportunity to do so will be denied defendant although a substantial right is involved. This becomes especially clear when it is understood that ground rules for assessing counsel fees were laid down subsequent to the final presentation of facts in this case and the District Court did not see fit to assess them (App. A, p. vi).

REASONS FOR GRANTING THIS WRIT

The three questions presented to the Court, when taken in the context of the judicial situation out of which they have arisen, places in issue fundamental questions relating to the role of the federal courts in the constitutional scheme of things. It is a situation whereby judicial restraint is clearly required in that the judicial process will have otherwise placed a litigant in a situation whereby it is impossible to obtain a full and fair hearing.

When the various orders of court involved in this case are examined in light of the findings and conclusions upon which they are based, the federal court doctrine of "judicial activism" is seen to be carried into the realm of what might be termed "judicial advocacy," the second stage in a three stage sequence of development, the final stage being "judicial anarchy."

The District Court was willing to assume jurisdiction on the basis of evidence which it acknowledged to be "manufactured by use of a deliberate subterfuge practiced upon

the defendant" (App. B, p. 32). This result goes beyond any result previously obtained under the traditional concepts of "judicial activism" as has been expressed in a long line of cases from *McCullock* v. *Maryland,* 4 Wheat 316 (1819) to *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and *Baker* v. *Carr,* 369 U.S. 186 (1962). Throughout the course of these cases, nothing quite like that which has occurred in the instant case has occurred before.

In every instance, the basic premise of federal court jursdiction was founded on a set of facts more soundly established than facts acknowledged to be manufactured by the parties seeking a hearing before federal courts. This situation is compounded when, upon appeal, the above stated situation is brought to the attention of the Appellate Court and it responds by doing two things:

1. Fails to examine the basic issue of jurisdiction although presented to it, but presumes it to exist; and

2. Reverses findings and conclusions of the district court which had negated jurisdiction in order to establish additional grounds for finding jurisdiction, although the findings and conclusions reversed were not challenged by appellant and were not briefed or argued by him.

The practical result of such appellate procedure is to put the party appealing a court's jurisdiction in an impossible position from which there is no recourse. On the one hand, the facts challenged in the appeal are presumed correct although clearly of a questioned status according to the District Court's own interpretation of them, yet facts unchallenged in the appeal are reversed. (Additionally, the appellate court penalized defendant without giving him an opportunity to be heard in respect to effective development of facts as would be required by *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402 (1968).)

The District Court, in its Opinion and Order, failed to consider the basic constitutional issue of federal courts jurisdiction. The Court of Appeals touched on it and found jurisdiction present. Both Courts agreed that defendant was subject to the Civil Rights Act of 1964, but on different grounds.

The grounds found by the District Court were purely statutory, the defendant served interstate travelers, all of whom were of the manufactured variety. The appellant insisted that federal courts should not base jurisdiction (whether founded on the Constitution or on statutes), based upon manufactured evidence and appealed accordingly. The appeal presented the fundamental question of whether constitutional jurisdiction (a prerequisite to statutory application of an act of congress) should be based on manufactured evidence, appellant insisting that it should not be so presumptiously founded.

The Court of Appeals in turn, by-passed this question by taking the two steps previously stated. In either case, the fundamental constitutional issue of federal court jurisdiction remains unanswered, and defendant finds himself in the strange dilemma of obtaining adverse rulings to matters and things unchallenged by the appeal. In effect, he has had an adverse ruling increased against him as the result of an appeal, while having the court by-pass the basic question raised in the appeal.

It is interesting to note that the Court of Appeals relied primarily on two recent cases to sustain its judgment; *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964); and *Katzenbach* v. *McClung,* 379 U.S. 294 (1964). The Court of Appeals stated:

> "The constitutional issues raised by this argument have been foreclosed. In the first place, the fact that Moore serves, or offers to serve, interstate travelers

> provides a sufficient constitutional basis for subjecting him to the Act. Congress has plenary power to regulate this phase of interstate commerce" (App. A, p. vi). Citing *Heart of Atlanta Motel, supra.*

This quote and citation exemplifies the very argument advanced by defendant. He has not challenged the constitutionality of the Act, nor the authority of Congress to regulate that phase of commerce involved in Act. In fact, the issues here challenged were conceded in the *Heart of Atlanta Motel* case; that is the defendant therein served or offered to serve interstate travelers. In the instant case, the jurisdictional facts of actually serving interstate travelers were challenged from the outset with the trial court finally concluding defendant did in fact serve them. It acknowledged, however, that this finding and conclusion was based on manufactured evidence resulting from a deliberate subterfuge. Surely, *Heart of Atlanta Motel, supra,* does not stand for the principle that federal courts will henceforth assume jurisdiction by any means possible including trickery and deceit. Given time enough (in this case about two and one-half years) any imaginative and dedicated attorney could manufacture enough evidence to create federal jurisdiction.

The Court of Appeals, however, turned an extra stone by not only by-passing the above question but by finding and concluding that defendant offered to serve interstate travelers, this being a reversal of the trial court. This was a means by which the Court of Appeals reinforced the finding of jurisdiction in the federal courts although this question was not presented by the defendant nor briefed by him. (The defendant would hardly appeal that part of a finding and conclusion not damaging to him. Defendant does suggest, however, that given the proper opportunity he could readily show this finding and conclusion of the Court of

Appeals to be clearly erroneous and contrary to the evidence of the case in that not one bona fide interstate traveler of any race has ever been served by defendant although many were turned away.) What is so inherently unfair in the conduct of the Court of Appeals, however, is that it even followed such a procedure; that it, reversing the trial court findings favorable to defendant in order to establish a basis to sustain the adverse order of the trial court, whiie at the same time failing to reach the very fundamental question actually presented by the appeal.

The critical question is the effect this kind of judicial practice can have upon the lives and conduct of the citizenry. Ultimately, it is the man in the street who is faced with the court interpretations of the Constitution and statutes properly adopted and unplemented according to that constitution. John Moore, the defendant in this case, is such a citizen. Should he be able to read and understand the Constitution and statutes so as to conduct his affairs? And if by chance he is accused of stepping outside the bounds thereof, should he expect a hearing before a fair arbiter of the of the facts and law irrespecteive of the nature of the question? It is suggested that he should fully expect such a result, but that it has been denied him by the steps taken in this extraordinary case.

The district court was willing to assume jurisdiction and base its decision on evidence acknowledged to be manufactured. Such conduct by any court goes beyond the limits of judicial conduct which might be called "judicial activism." This is advocacy of a result irrespective of the impact upon general conduct, it states the end justifies the means. We are in an era when "judicial activism" pervades not only this country but the mother country also. Where *London Tramways Company* v. *London County Council,* (1898) A. C. 375, was recently modified by a statement of the Lord

Chancellor and all nine Lords of Appeal in Ordinary on July 26, 1966. They recognized "that too rigid adherence to precedent may lead to injustice in a particular case . . . ." (110 Sol. J. 584 (1966)).

It is not argued that, within sound limits, decisions of the federal courts which sanction and support social legislation may very well prove *wise*. As stated in *"Stare Decisis* v. *Judicial Activism: Nothing Succeeds Like Success,"* by Harold F. Birnbaum, 54 ABA Journal 482 at page 488:

> "If social legislation keeps within sound limits the decisions of the Supreme Court which sanctioned its constitutionality will prove to have been *wise*. If the country drowns in a sea of government regulations, the Supreme Court will share, with the legislatures, the responsibilities for the flood of regulations pouring through the opened gates."

This particular quotation is particularly appropriate in application to this case. Here is a situation where a defendant went the last mile in avoiding federal regulation, yet a federal court (rather than the legislature), presumed it could found jurisdiction on the most nefarious basis. Of course, the defendant appealed such a decision only to have the principal question raised by his appeal by-passed—additionally; he had findings favorable to him reversed so as to justify sustaining the Order. Further an additional penalty of attorney's fees was imposed upon him, although no factual hearing in respect to them was granted him, and the guide lines for imposing or not imposing them had not been stated until after the decision of the trial court. This result would be akin to appealing from a criminal conviction and having the jury verdict reversed or ignored, but to be found guilty of an even greater offense with additional penalties imposed. Surely, the decision of *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) intended no such denial of due process of law.

The Supreme Court has been leading the way in establishing procedural safeguards for the protection of criminal defendants. *Glasser* v. *United States,* 315 U.S. 60; *Palko* v. *Connecticut,* 302 U.S. 319; *Griffin* v. *Illinois,* 351 U.S. 12; *Gideon* v. *Wainwright,* 372 U.S. 335; *Escobedo* v. *Illinois,* 378 U.S. 478; and *Miranda* v. *Arizona,* 384 U.S. 436; among many others. There is no less a reason to have procedural safeguards established in civil matters. As Justice Fortas so clearly stated in an article entitled *"Dangers to the Rule of Law,"* 54 ABA Journal 957 at pp. 958 and 959:

> "Constitutionalism is not a technicality. Constitution rights are not technicalities. *This* is the phrase that should ring in the nation's ear.
>
> "Constitutional procedure is the heart, conscience and soul of a civilized community. It is the basic principle for which men from the earliest days have fought and died. What is liberty if it is not the right to due process of law, in all of its forms, before the state may consign a man to prison or take his life?" (Or take his property?)

* * *

"Bench and Bar Have Resisted Pressures

> "I believe—and I am proud to say—that the instances in this nation in which judges or courts or lawyers have succumbed to pressure are few and far between. I believe that this is a cardinal reason why our Constitution has survived and why we have survived as a nation of free people. If the courts of this nation should ever yield to the assaults of any group, however deserving, . . . our system of constitutional government could not survive. . . . Our system of law—the rule of law—depends upon lawyers and judges. It cannot exist unless lawyers are free fearlessly to represent their clients and fearlessly to urge the legal and constitutional principals they believe to be appropriate."

An attorney cannot freely advance those constitutional principles which he believes appropriate, and take issue with decisions of the lower courts, if he must also contemplate reversal of those matters ruled favorably to him without a full hearing on them—and also contemplate the imposition of punitive attorneys' fees, without a hearing thereon or a finding that the appeal was not taken in good faith.

When such a result does take place, when a court acts and reacts to a judicial situation as it has in this case, then it goes beyond the limits which judicial restraint contemplate. It is no longer an "activist" court pointing the way, it is an advocate openly pressing a cause. When this situation develops, due process of law can no longer be advanced.

It is generally recognized that the federal judiciary is a very peculiar legislative agency. It is responsible to nobody but itself. It has not hesitated to legislate on numerous occasions but it has also built-in self-imposed limitations when doing so. This is required because when the federal courts do impose new standards they must speak in terms of broad platitudes capable of excessively broad interpretation by advocates.

In *Brown* v. *Board of Education, supra,* such a self-imposed limitation appears in the language of the Court wherein desegregation was required, "with all deliberate speed." (See *"The Supreme Court and Natural Law,"* by Harry J. Hagan, 54 ABA Journal 570 at p. 573.)

When the inferior courts within the federal system do not exercise that restraint required of them by the very nature of the situation out of which the case or controversy arose, the Supreme Court must intervene and exercise control. This is imperative wherein the federal jurisdiction itself is at issue as well as basic concepts of due process. From the facts of this case and from the course of judicial de-

velopment this case has followed, one conclusion appears inescapable; the inferior federal judiciary is predisposed toward one result irrespective of the merits, it is not serving as an impartial arbiter but playing the role of advocate. The role of the courts and of law is dramatically and clearly stated in the play, "A Man For All Seasons," when Sir Thomas More addressed his son-in-law, Roper:

> "Roper: So now you'd give the Devil benefit of law?
>
> "More: Yes. What would you do? Cut a great road through the law to get at the Devil?
>
> "Roper: I'd cut down every law in England to do that?
>
> "More: Oh? And when the last law was down and the Devil turned round on you—where would you hide, Roper, the laws being all flat? This country's planted thick with laws from coast to coast—man's laws—not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil the benefit of law, for my own safety's sake."

And so it is with the situation created here and now facing this Court. The laws can be cut down by changes in either their substance or by implementation or procedural devices or by both devices. This has long been recognized. The end result is the same, the creation of a two-edged sword which can cut one way today and another way tomorrow—and who knows what tomorrow may bring. It is defendant's contention that tomorrow can bring anarchy and havoc if this present course of judicial process is permitted to stand unchecked.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals, Fourth Circuit

BUTZNER, Circuit Judge:

John Moore appealed an order of the district court, entered pursuant to Title II of the Civil Rights Act of 1964, enjoining him from discriminating against Negroes in the operation of Moore's Barbecue Restaurant. The action was brought by Negroes who had been denied service on account of their race. Moore admits he does not serve Negroes, but he contends that the operations of his restaurant do not have a substantial effect upon interstate commerce and that the district court lacked consitutional and statutory authority to grant the injunction. We affirm the order of the district court and remand the case for the allowance of counsel fees to the plaintiffs.

Moore's restaurant is located on Broad Street, which is also U.S. Highways 17 and 70, in New Bern, North Carolina. Parking spaces are provided between the building and the street and to one side of the building. The restaurant has accommodations for about 100 people. Moore posted signs with 1¾ inch lettering in the windows by the entrances:

> "We do not cater to interstate patrons and the principal foods sold in this restaurant are North Carolina products."

Also on the premises are much larger signs bearing the name of the restaurant. Moore advertises extensively on the radio and in newspapers. A newspaper in which he advertises is given to all persons who register in a New Bern motel. Neither the large signs nor the advertisements mention the origin of the food that is served or place any restrictions on clientele.

Moore testified that if he determined that prospective

customers were interstate travelers, he refused service. He admitted, however, that not every interstate traveler could be excluded.[1]

Six white persons testified that they had been served at the restaurant without being questioned concerning their interstate status. All six were strangers to Moore and his employees. One of the witnesses came from Washington, D. C., the day before the trial. The other five witnesses, four of them nonresidents of North Carolina temporarily working in the state, had visited the restaurant on two separate occasions in groups of two and three.

Section 201 of the Act [42 U.S.C. § 2000a] provides in part:

> "(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> "(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

---

[1] Moore testified:

"Q. Do you serve anyone whom you determine to be from outside of North Carolina? A. No, sir.

"Q. Mr. Moore, can you keep out every person who is from outside of North Carolina? A. It is impossible for me to keep everyone out.

"Q. For example today, suppose someone should come to your place of business who is walking, and just walks in at the rush hour, and giving no indication of driving a car of any kind.

"Would that person be served? A. Well, I would think that he wouldn't be an—excuse me. Yes, sir. We would not think that would be an interstate traveler."

. . . .

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises . . .

. . . .

"(c) The operations of an establishment affect commerce within the meaning of this subchapter if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce . . ."

The three grounds for coverage found in subsection (c) are in the alternative. Only the third, the movement in commerce of a substantial portion of food, required a showing of substantiality.[2] We agree with the district judge that Moore's restaurant served interstate travelers. This establishes a basis for coverage. The district judge concluded, however, that the evidence failed to disclose an offer to serve interstate travelers. We disagree. Whether a restaurant offers to serve interstate travelers must be determined objectively and not from the subjective intent of the owner. The location of Moore's restaurant on a street that serves as two federal highways, has unrestricted newspaper and radio advertising, and his readiness to serve white strangers without interrogation concerning their status demonstrate that he offered to serve white travelers, regardless of their residences. Against this background, Moore's proclamation that his restaurant did not "cater to interstate patrons" and his refusal to serve known interstate travelers is scant

[2] An unsuccessful effort was made in the House of Representatives to amend the Act by striking "it serves or offers to serve interstate travelers . . ." and inserting in its place "a substantial number of the patrons it serves are interstate travelers . . ." 110 Cong. Rec. 1984, 1987 (1964).

objective evidence to the contrary. Cf. *Gregory* v. *Meyer*, 376 F.2d 509, 510 (5th Cir. 1967).[3]

Moore argues that in the absence of a direct and substantial connection between his operation and interstate commerce, an injunction was constitutionally impermissible. The constitutional issues raised by this argument have been foreclosed. In the first place, the fact that Moore serves, or offers to serve, interstate travelers provides a sufficient constitutional basis for subjecting him to the Act. Congress has plenary power to regulate this phase of interstate commerce. Cf. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 253 (1964). Secondly, the triviality of the impact of Moore's restaurant upon interstate commerce does not preclude application of the Act. The effect upon interstate commerce of Moore's business combined with that of similar establishments is not trivial. This circumstance also affords a basis for Congressional regulation. Cf. *Katzenbach* v. *McClung*, 379 U.S. 294, 299 (1964); *Wichard* v. *Filburn*, 317 U.S. 111, 127 (1942).

The district judge did not allow the plaintiffs counsel fees. After his decision, the Supreme Court held that "one who succeeds in obtaining an injunction under . . . [Title II of the Civil Rights Act of 1964] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park*

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[3] The district court, having found the restaurant subject to the Act because it served interstate travelers, did not make detailed findings of fact with respect to the third test—food that moved in interstate commerce. It totaled the cost of items that Moore purchased from out of state suppliers. This, however, is not the sole basis upon which the substantiality of products moving in commerce is determined. In addition to out of state purchases, there should have been included all out of state products furnished by Moore's North Carolina suppliers. Katzenbach v. McClung, 379 U.S. 294 (1964). We express no opinion concerning coverage under the third test, but in view of our disposition of the case, it is unnecessary to remand for further findings on this issue.

Enterprises, 390 U.S. 400, 402 (1968). These circumstances do not appear in this case, and upon remand the district court should include reasonable counsel fees as part of the costs.

As modified, the judgment is

Affirmed.

Judgment of the United States Court of Appeals, Fourth Circuit

APPEAL FROM *the United States District Court for the* Eastern *District of* North Carolina.

THIS CAUSE *came on to be heard on the record from the United States District Court for the* Eastern *District of* North Carolina, *and was argued by counsel.*

ON CONSIDERATION WHEREOF, *It is now here ordered and adjudged by this Court that the* order *of the said District Court appealed from, in this cause, be, and the same is hereby,* affirmed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of North Carolina, at New Bern, to include reasonable counsel fees as part of the costs, consistent with the opinion of the Court filed herein.

/s/ SAMUEL W. PHILLIPS
Clerk

A True Copy, Teste:
Samuel W. Phillips, Clerk

By /s/ MARGARET M. WALTON
Deputy Clerk

FILED
Sept. 3, 1968
Samuel W. Phillips
Clerk

Costs of Appellees:
Cost of printing brief and appendix at not exceeding $3.00 per printed page.

Stipulation of Counsel

We, the undersigned attorneys for the plaintiffs and for the defendant in the above entitled case, do hereby stipulate and agree that the case as presented to the United States Court of Appeals for the Fourth Circuit, according to the following:

1. Appendix to Appellant's Brief;
2. Appendix to Appellees' Brief;
3. Opinion of the Court Below; and
4. Judgment of the Court Below;

be the Record of the Case upon which a petition for writ of certiorari shall be presented.

Witness our hands and seals, this the ..... day of November, 1968.

CHAMBERS, STEIN, FERGUSON & LANNING
By: /s/ J. LEVONNE CHAMBERS
J. LEVONNE CHAMBERS, Attorney for Plaintiffs.

/s/ DOUGLAS P. CONNOR
DOUGLAS P. CONNOR, Attorney for Defendant.